IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1919.

No. ~~382.~~ 111

NATIONAL BRAKE & ELECTRIC COMPANY, *Petitioner,* vs. NIELS A. CHRISTENSEN and ALLIS-CHALMERS COMPANY, *Respondents.*	Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

MOTION TO DISMISS WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

JOSEPH B. COTTON,
WILLET M. SPOONER,
WILLIAM R. RUMMLER,
LOUIS QUARLES,
Solicitors and of Counsel for Respondents.

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1919.

No. 382.

NATIONAL BRAKE & ELECTRIC COMPANY,
Petitioner,

vs.

NIELS A. CHRISTENSEN and ALLIS-CHALMERS COMPANY,
Respondents.

Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

MOTION TO DISMISS WRIT OF CERTIORARI ISSUED TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Now come the respondents Niels A. Christensen and Allis-Chalmers Company, by their solicitors of record herein, and move this Honorable Court:

First, to dismiss the writ of certiorari now pending herein on the ground that the court has not jurisdiction thereof, the sole appropriate appellate remedy being by appeal.

Second, to dismiss the aforesaid writ of certiorari upon the ground that it was improvidently granted because an appeal to this court would lie at the instance of petitioner as a matter of right.

JOSEPH B. COTTON,
WILLET M. SPOONER,
WILLIAM B. RUMMLER,
LOUIS QUARLES,
Solicitors of Record for Respondents herein.

NOTICE OF MOTION.

The petitioner is hereby notified that the respondents will on the 17th day of November, A. D. 1919, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of the said court the foregoing motions and each of them and the brief in support thereof hereto attached, all of which are now served upon you herewith.

JOSEPH B. COTTON,
WILLET M. SPOONER,
WILLIAM R. RUMMLER,
LOUIS QUARLES,
Solicitors of Record for Respondents herein.

Copy of the foregoing motion and notice, together with the annexed brief and argument in support thereof, received this.....day of October, 1919.

.....

.....

Solicitors of Record for Petitioner.

BRIEF IN SUPPORT OF MOTION.

STATEMENT OF FACTS.

Petitioner asks this court to take jurisdiction of and review the decision of the United States Circuit Court of Appeals for the Seventh Circuit refusing to grant the relief prayed by it as petitioner in that court in an original proceeding commenced therein by original petition filed August 19, 1918.

Respondents herein, as plaintiffs filed a bill of complaint in the District Court for the Eastern District of Wisconsin (known as Equity No. 474) alleging infringement by petitioner herein as defendant of a grant of a patent monopoly right evidenced indifferently by two patents numbered 621,324 and 635,280 respectively and referred to as the first and second patent respectively. It appeared that the first patent when issued to respondent Christensen was inaccurate, in that it contained a fugitive sheet of drawing. He thereupon returned it to the patent office with the request that a correction thereof be made, and that was done by the office marking the patent cancelled and issuing to him a second patent identical in every respect with the first patent excepting only the omission of the fugitive sheet and the date and term thereof. Trial was had with the result that on August 21, 1914, a decree finding validity and infringement was entered in said District Court. An appeal was taken to the Circuit Court of Appeals for the Seventh Circuit, with the result that on October 5, 1915, the aforesaid decree was affirmed (229, Fed., 561). Rehearing was denied and a writ of certiorari denied by this court (241 U. S., 659).

The accounting proceedings under this decree were commenced on March 1, 1916, and continually and vigorously prosecuted, with the result that the master's final report was rendered March 26, 1919, complete except for certain clerical computation which the master directed to be done.

After the affirmance of the decree finding validity and infringement and on March 11, 1916, respondents commenced another action involving the same patents, against the Westinghouse Traction Brake Company in the District Court for the Western District of Pennsylvania. This suit was dismissed without prejudice on February 24, 1917. The Circuit Court of Appeals for the Third

Circuit, however, on petition for certiorari or mandamus decided that the defendant was entitled to judgment on the bill and answer as to which of two patents was valid.

Because of the circumstance that the defendant Westinghouse Traction Brake Company was only charged with notice of the second of these two patents and that they both had expired, leaving only the question of accounting, the court was interested in the relative validity of the two, and held that the second patent was void as evidence of the grant, but that the first was valid, and on July 3, 1917, directed a dismissal of the bill as to the first and a continuance of it as to the second.

In the action previously referred to in the Wisconsin District Court, that court and the Court of Appeals for the Seventh Circuit held that the question of which of the two patents evidenced the grant was as to the defendant therein (petitioner herein) "academic" inasmuch as they had neither of them expired and the petitioner had knowledge and notice of both. Therefore either of them would support the bill and the relief prayed for therein.

On this state of facts and about three years after the affirmance of the decree finding validity and infringement of the patent, petitioner filed its original petition in the Circuit Court of Appeals for the Seventh Circuit, review of which is sought herein, claiming its right to a termination of the pending accounting litigation on the merits because of *res adjudicata*, alleging that the Court of Appeals of the Seventh Circuit had held that the first patent was not the evidence of the grant and had granted the accounting under the second patent; that the Court of Appeals in the Third Circuit had held that the second patent was not the evidence of the grant, that the defendant in the Third Circuit, Westinghouse Traction Brake Company, was in privity with the defendant in the Seventh Circuit (which was denied, and which issue has never been determined), and that therefore it was entitled to a writ from the Court of Appeals of the Seventh Circuit commanding the District Court to forthwith terminate the litigation in their favor on the merits because of the aforesaid judgments.

This original petition was aptly described by the Court of Appeals in its opinion, in the following language:

> "And now petitioner comes before us in an original proceeding, asking that we recall our mandate, vacate our decree, find that the Pennsylvania decree is

res adjudicata in this case, and thereupon direct the vacation of the Wisconsin decree and the dismissal of the bill on the merits." (Rec. p. 257).

The petition was denied by the Court of Appeals on the ground that its prior decision of October 5, 1915, awarding the perpetual injunction and an accounting was final in essence, that it did not have only a temporary purpose and force but that it fixed the rights of the parties.

OUTLINE OF ARGUMENT.

1. *The petition to the Court of Appeals, a denial of which is sought to be here reviewed by certiorari, was an original proceeding in that court.*

2. *The controversy tendered by said petition was purely a question of general law, i. e., of res adjudicata, and was therefore not "a case arising under the patent laws."*

3. *The decree of the Circuit Court of Appeals denying this petition was not made final by The Judicial Code because it was not a "case arising under the patent laws."*

4. *The only proper method of reviewing the decision of the Court of Appeals denying this petition is by appeal to this court as of right, not certiorari.*

5. *Petitioner has therefore mistaken his remedy and the certiorari should be denied for want of jurisdiction.*

6. *For the same reasons the certiorari should be dismissed as improvidently granted.*

ARGUMENT.

1. *The petition to the Court of Appeals, a denial of which is sought to be here reviewed by certiorari, was an original proceeding in that court.*

The judicial machinery of the Circuit Court of Appeals was initially set in motion by an original petition filed almost three years after the affirmance of the decree of the District Court finding infringement (Rec. p. 1). It was based upon the claim of *res adjudicata* because of subsequent supervening judgments in another action in a different circuit. Pursuant to a rule to show cause (Rec. p. 6) an answer was filed (Rec. p. 7) and the issues tendered therein were covered by a stipulated record made up of excerpts from pleadings, decrees, testimony, etc., in the case pending in the Wisconsin District Court

and in the cases in the Pennsylvania District Court and the Court of Appeals for the Third Circuit. (Stipulation Rec. p. 13.) This method of making up the record thereon is referred to by the Court of Appeals in its opinion (Rec. p. 257).

The petition referred to was addressed to the Court of Appeals and calls on its supervisory power over the District Court. Whatever the petitioner may have neglected to call it, and it was careful not to name it too closely, it was really and in essence a petition for writ of prohibition. It is described by the Court of Appeals in its opinion in the following language:

> "And now petitioner comes before us *in an original proceeding*, asking that we recall our mandate, vacate our decree, find that the Pennsylvania decree is *res adjudicata* in this case, and thereupon direct the vacation of the Wisconsin decree and the dismissal of the bill on the merits." (Italics ours.) (Rec. p. 257.)

In the verified petition for writ of certiorari to this court the petitioner therein aptly describes the petition as

> "this original proceeding entitled as above, National Brake & Electric Company, Petitioner, v. Niels A. Christensen and Allis-Chalmers Company, Respondents: An application for an order directing the dismissal of the bill brought in the United States District Court for the Eastern District of Wisconsin." (Petition p. 10.)

The record made up on the petition and answer shows that a motion had previously been made before the District Judge to dismiss the said suit and that he had denied the same (Rec. pp. 242 and 252). It was conceded that this decision was not appealable and no appeal was in fact taken therefrom; nay, the petitioner went further and claimed in its petition that the District Judge was without authority to entertain this motion that it itself had previously made in his court. (Paragraph 9 of petition, Rec. p. 4).

The question was brought out in sharp relief by the petitioner's making a motion in the District Court in Wisconsin to stay the accounting proceedings because of the issuance of this writ of certiorari. The basis for this claim was that the writ was *ipso facto* a stay. Respondents argued that that rule was not applicable because the certiorari was issued to review the original independent proceeding in the Court of Appeals and not the account

ing proceeding, and that therefore the writ and the stay did not reach said proceeding. The District Judge made a masterly analysis of the situation, saying in his opinion:

> "It may be conceded as quite elementary that ordinarily the issuance of a writ of certiorari carries with it a supersedeas. But I cannot escape the conviction that the judgment which is the subject of the present proceedings in this court, is not at all affected, either by the petition filed in the Circuit Court of Appeals, nor by the certiorari issued by the Supreme Court. Such petition, filed three years after the Circuit Court of Appeals had exhausted its appellate jurisdiction,—and the latter was the only jurisdiction ever invoked,—is clearly of the nature of an original proceeding, and, in my judgment, particularly in view of the refusal of the Court of Appeals to grant the relief prayed for, reaches neither the judgment nor this court.
>
> * * * * *
>
> It has seemed to me that whatever the character of the petition filed in the Court of Appeals, the situation in this court so far as affected by that petition and its attempted review by the Supreme Court, is no different than if the declared purpose had been to obtain leave of the Court of Appeals to file a supplemental bill in the nature of a bill of review in this court,—based upon the proceedings in the Third Circuit. If in such situation the Appellate Court refused leave, it could hardly be said that a certiorari to its ruling reached the judgment which, under the original mandate then rested in the District Court for exclusive enforcement."

The petition itself and the issues therein tendered are analyzed under Point 2 *infra*, to which portion of the brief we respectfully refer.

The action was not in aid of its appellate jurisdiction, nor in the nature of petition for rehearing or anything of that sort, for it must be conceded that the power of that court over its mandate expired with the expiration of the term at which it was rendered.

Waskey et al v. Hammer et al, 179 Fed., 273 (C. C. A., 9th Cir.)

Westinghouse T. B. Co. v. Orr, 252 Fed., 592 (C. C. A., 3rd Cir.)

Neither did the petition have any of the earmarks of an ancillary proceeding. Tests of what proceedings are ancillary are these: (a) Those that are in *aid* of appellate jurisdiction, not contrary thereto; (b) Those that call for further relief from an appellate court *based upon the record in the suit below;* and (c) Those that are made in the court while a proceeding is pending therein and based on the record thereof. In cases where, as here, the relief prayed for is based, not upon the proceedings in the record of the action pending in the District Court, but upon facts *dehors* that suit, such as judgments obtained elsewhere and at a later date and the proceeding itself in which the relief is sought is not pending before the tribunal from which relief is asked, the proceeding cannot be ancillary. All the recognized tests fail.

The distinction has been affirmed in

Barrow v. Hunton, 99 U. S., 80 (9 Otto)

the court saying:

"The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere *revision of errors and irregularities, or of the legality and correctness of the judgments* and decrees of the State courts; and in the other class, the investigation of a *new case arising upon new facts*, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof." (Italics ours.)

To the same effect was the decision in

Marshall v. Holmes, Sheriff, 141 U. S., 589:

"'These principles control the present case, which, although involving rights arising under judicial proceedings in another jurisdiction, is an *original, independent suit for equitable relief* between the parties; such relief being grounded upon *a new state of facts*, disclosing not only imposition upon a court of justice in procuring from it authority to sell an infant's lands when there was no necessity therefor, but actual fraud in the exercise, from time to time of the authority so obtained. As the case is within the equity jurisdiction of the Circuit Court, as defined by the Constitution and laws of the United States, that court may, by its decree, lay hold of the parties, and compel them to do what according to the principles of equity they ought to do, thereby securing and establishing

the rights of which the plaintiff is alleged to have been deprived by fraud and collusion.'

"These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction."

The jurisdiction in that case was based on diversity of citizenship but would not attach if the action were ancillary to the proceeding reviewed which was in the probate court.

It was held where a suit was begun which did not seek to disturb a judgment on the ground it was rendered through fraud or to have anything done towards carrying it out, that it was independent and not ancillary.

Stillman v. Combe, 197 U. S., 436.

We submit that it is clear that the proceeding pending in the Court of Appeals for the Seventh Circuit to review which judgment the certiorari was granted, is an original proceeding involving only questions of general law and is separate and distinct from the accounting in the District Court.

2. *The controversy tendered by said petition was purely a question of general law, i. e., of res adjudicata, and was therefore not "a case arising under the patent laws."*

The jurisdictional provision in The Judicial Code which is under construction here is Section 128 thereof, which provides:

"The circuit courts of appeal shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts * * * and * * * the judgments and decrees of the circuit courts of appeal shall be final * * * in all cases arising under the patent laws * * *."

It is settled law that the question as to whether a case is one arising under the patent laws is to be tested by the frame of the bill, declaration, petition, or other initial pleading on the part of the *reus* or actor.

Odell v. F. C. Farnsworth Co., — U. S., —.
(June 9, 1919.) 38 Sup. Ct. Rep., 516.

This court has stated the matter thus: That the party bringing the proceeding is

" 'master to decide what law he will rely upon and

the allegations of his bill are the evidence, or the expression, of his decision, upon which the courts must act in determining the question of their jurisdiction."

It is a familiar rule that

"all actions in which patent *questions* arise are not patent *cases* nor cases arising under the patent laws."

The distinction is clearly made and the question set at rest in

Pratt v. Paris Gas Light Co., 168 U. S., 255, 259.

That was an action in assumpsit for the value of certain patented machines sold. The defense was that the plaintiffs had agreed to defend any action that might be brought against the defendant as vendee by reason of letters patent, and because of their refusal to do so the defendant had been enjoined from the use of the machine and therefore it was valueless, and that the patent was void, and the consideration wholly failed. The question of jurisdiction was involved as to whether this action was tryable in the state or federal courts. It was held not to be a *case* arising under the patent laws even though patent *questions* were involved, and therefore was not tryable in the federal courts where jurisdiction was to be predicated upon this ground alone. The court said:

> "The action under consideration is not one arising under the patent right laws of the United States in any proper sense of the term. To constitute such a cause the plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction of these laws. *Starin v. New York*, 115 U. S., 248; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473.
>
> "The state court had jurisdiction both of the parties and the subject-matter as set forth in the declaration, and it could not be ousted of such jurisdiction by the fact that, incidentally to one of these defences, the defendant claimed the invalidity of a certain patent. To hold that it has no right to introduce evidence upon this subject is to do it a wrong and deny it a remedy. Section 711 does not deprive the state courts of the power to determine *questions* arising under the patent laws, but only of assuming jurisdiction of *'cases'* arising under those laws. There is a

clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading—be it a bill, complaint or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals."

The aforesaid Pratt case has been very recently approved as good law by this court in

Odell v. F. C. Farnsworth Co., supra.

Tested by these rules an analysis of the issues tendered by the petition to the Circuit Court of Appeals for the Seventh Circuit show that they were all questions of general law, i. e., questions of *res adjudicata*, and that no patent questions were involved. There was no question of infringement of the patent or of validity in view of the prior art, or construction of the patent laws,—merely the question of whether the petitioner had or had not a patent because of the proper construction to be placed upon certain decrees pleaded as former adjudications of his rights. The Court of Appeals in disposing of the motion said that the only question they were called upon to decide was to "find that the Pennsylvania decree in *res adjudicata* in this case, and thereupon direct the vacation of the Wisconsin decree and the dismissal of the bill on the merits" (Rec. p. 237).

The allegations in petitioner's own petition to this court for writ of certiorari clearly support this analysis of the situation. Petitioner states:

"that the said Circuit Court of Appeals in denying said application for motion based its decision solely on the position that for the purposes of determining the rights of the parties and of constituting the basis of a plea or claim of *res adjudicata* the decree * * * was a final decree and not an interlocutory decree." (Petition p. 6.)

Allegations to the same effect are found in the petition page 8 thereof:

"the Circuit Court of Appeals took jurisdiction of the application, considered the same as 'an original proceeding,' * * * and decided the same as before set forth solely on the question of the final or interlocutory nature of the decree of the Wisconsin District Court." (Petition p. 9.)

An analysis of the original petition itself shows the same thing. The petitioner asked the court for an order directing the District Court to dismiss the suit pending below, setting up the following grounds only: "This motion is based upon the ground that all of the issues in the case have been once and finally determined and adjudicated in said defendant's favor by the United States Circuit Court of Appeals for the third circuit and by the final decree of the district court for the western district of Pennsylvania in a suit between the said plaintiffs and the Westinghouse Traction Brake Company, with which company this said company was in privity." (Paragraph 2, Rec. p. 2)

The prayer in the petition is similarly framed, reciting:

> "This applicant and petitioner moves and prays * * * that this Honorable Court take jurisdiction * * * hereof and inquire into and determine the status of said case as herein outlined, and as to the force and effect of said final judgment and order of said suit in the District Court for the Western District of Pennsylvania, and find and adjudge that the same was and is a valid and final adjudication against said patent, No. 635,280, and that the said patent last mentioned was and is invalid and void; (similar allegations that the first patent had been adjudged void in equity 171) * * * and that this defendant is entitled thereon to a final decree in said suit in the District Court for the Eastern District of Wisconsin, dismissing said suit for want of equity. * * *" (Rec. pp. 5 and 6).

The prayer continues and asks that necessary writs of certiorari, etc., be issued to carry out the demands of the petitioner.

An analysis of the petition to the court of appeals therefore shows that in paragraph 2 hereof petitioner stated that its sole ground was that all the issues had been finally determined in petitioner's favor by the courts in the third circuit and in the prayer it prays that it be given the benefit of said adjudications, that the court of appeals issue such writs of certiorari or otherwise as will be necessary to inform themselves thereof, and then direct the district court to dismiss the entire proceedings on the merits of said prior adjudications.

We respectfully submit that the controversy in the Court of Appeals involved purely a question of general law and was not "a case arising under the patent laws."

3. *The decree of the Circuit Court of Appeals denying this petition was not made final by The Judicial Code because it was not a "case arising under the patent laws."*

Under the provisions of The Judicial Code, sec. 240, certiorari will lie to the Circuit Court of Appeals in cases in which the judgment of that court is made final by the provisions of the act. That section provides:

> "Sec. 240. In any case, civil or criminal, in which the judgment or decree of the circuit court of appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

The portion of the act defining in what cases the decree of the Circuit Court of Appeals is made final is Section 128, and the pertinent portions of that are:

> "and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

Section 239 provides for the certification of questions by the Court of Appeals to this court, and section 240 we have just quoted *supra*. It is apparent therefore, that the petition in question in this case is not within the call of the statute, sec. 128. Therefore the decision of the Court of Appeals is not made final because, as heretofore argued, it is not "a case arising under the patent laws."

4. *The only proper method of reviewing the decision of the Court of Appeals denying this petition was by appeal to this court as of right, not certiorari.*

There are three ways in which this court may take jurisdiction in an appellate capacity:

(1) Appeal,
(2) Writ of error,
(3) Certiorari.

The first two of these will hereafter be considered as one as they lie as of right, whereas the second is merely discretionary.

The rule is that a certiorari will not lie to an inferior tribunal to review a decision which is reviewable by appeal or writ of error.

Deaver v. New York Trust Co., 229 U. S., 123, 133.

This rule is based on sections 128 and 240 of The Judicial Code, quoted *supra*, the first one defining in what cases the Court of Appeals' decision shall be final, and the second providing that in such cases this court may review the determination by certiorari.

The jurisdiction of this Supreme Court in this respect is entirely dependent upon the Judicial Code and the question of whether appeal or certiorari is the proper remedy depends upon whether or not the decision of the Court of Appeals is made final by the provisions of the Judicial Code.

If, as argued above, this is a case in which the decree of the Circuit Court of Appeals is not made final by the statute, then the appellate procedure is covered by section 241 of The Judicial Code (a companion section of section 240) and which reads as follows:

> "Sec. 241. In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs."

That certiorari and appeal are independent is clear, and in

Farrell v. O'Brien, 199 U. S., 89, 101,

an appeal was dismissed on motion because the case was not one founded on diversity of citizenship but jurisdiction was retained upon the petition for certiorari, which was co-pending with the appeal. In that case the record filed on the appeal was treated as a return for the writ but the jurisdictional distinction was maintained throughout.

Since the passage of the act of Sept. 6, 1916, (6 Comp. Stats, sec. 1228a) the jurisdiction of this court has been limited and defined and the two remedies brought in sharp contradistinction. Since that act in divers cases appeals [illegible] Miller & Co. [illegible] FIVE and writs of error have been dismissed because the proper remedy was certiorari and of course the converse of the ruling is equally applicable. Among the leading cases are:

Dana v. Dana, 39 Sup. Ct. Rep., 449; — U. S., —.

Citizens Bank v. Opperman, 39 Sup. Ct. Rep., 330; — U. S., —.

Rust Land, etc. Co. v. Jackson, 39 Sup. Ct. Rep., 424; — U. S., —.

It will not avail petitioner to claim that the distinction is immaterial, for the time within which to pray an appeal is now limited to three months from the rendition of the decree. (Act of Sept. 6, 1916, F. S. A. Supp. 1918, p. 422.) This statute is a limitation on the jurisdiction of the court.

Dana v. Dana, 39 Sup. Ct. Rep., 449; — U. S., —.

Citizens Bank v. Opperman, 39 Sup. Ct. Rep., 330; — U. S., —.

Rust Land, etc. Co. v. Jackson, 39 Sup. Ct. Rep., 424; — U. S., —.

The two remedies of appeal and certiorari are sharply distinguished not only by the nature but because one is granted as of right and the other is purely discretionary. This distinction is reinforced by the following portion of the recent Act of September 6, 1916 (F. S. A. 1918 Supp. p. 421) which is really a statute of jeofails.

"That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the error and take the action which should be appropriate if the proper appellate procedure had been followed."

Note that it is merely the two writs of right that are interchangeable and neither of them are made interchangeable with the discretionary writ. *Expressio unius est exclusio alterius.*

Similar phrascology in sec. 240 of The Judicial Code giving this court power to review by certiorari or otherwise does not help out petitioner because that is by the terms of the section limited to decisions in which the decree of the Court of Appeals "is made final by the provisions of this Title," whereas this decree not being such its appellate jurisdiction is governed by section 241.

5. *Petitioner has therefore mistaken his remedy and the certiorari should be denied for want of jurisdiction.*

For the reasons stated *supra*, petitioner was afforded a clear right of appeal from the judgment of the Court of Appeals under section 241 of The Judicial Code and the power of this court to issue certiorari to Circuit Court of Appeal is limited by section 240 of The Judicial Code to cases in which a decree of that court is made final by the provisions of the act. This case not being one of these, the writ will not lie, and it should therefore be dismissed for want of jurisdiction.

Denver vs. New York Trust Co., 229 U. S. 123, 133.

6. *For the same reasons the certiorari should be dismissed as improvidently granted.*

It is within the undoubted power of this court to dismiss a writ of certiorari if and when it appears that the same has been improvidently granted,

Furness vs. Yang-Tsze Ins. Assn., 242 U. S. 430,

and where it appears that petitioner has elected the wrong remedy the writ should be dismissed as improvidently granted.

Respectfully submitted,

JOSEPH B. COTTON,
WILLET M. SPOONER,
WILLIAM R. RUMMLER,
LOUIS QUARLES,

Solicitors and of Counsel for Respondents.